

CANADA / JUDGMENT

Bilfinger Berger (Canada) v. Greater Vancouver Water District

2010 BCSC 1104

COURT

Supreme Court of British Columbia

DECIDED

6 July 2010

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2010 BCSC 1104 Bilfinger Berger (Canada) v. Greater Vancouver Water District IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Bilfinger Berger (Canada) v. Greater Vancouver Water District, 2010 BCSC 1104 Date: 20100706 Docket: S084599 Registry: Vancouver Between: Bilfinger Berger (Canada) Inc., Bilfinger Berger AG, Fru-Con Construction Corporation and Bilfinger Berger/Fru-Con, a Joint Venture Plaintiffs And Greater Vancouver Water District, Greater Vancouver Regional District, Greater Vancouver Sewerage and Drainage District, Hatch Mott Macdonald Ltd., and The Corporation of the District of North Vancouver Defendants AND Docket: S083856 Registry: Vancouver Between: The Greater Vancouver Water District Plaintiff And Bilfinger Berger AG, Bilfinger Berger (Canada) Inc., Fru-Con Construction Corporation and Bilfinger Berger/Fru-Con, a joint venture, Travelers Guarantee Company of Canada La Compagnie Travelers Garantie Du Canada, Chubb Insurance Company of Canada Chubb Du Canada Compagnie D'Assurance and Zurich Insurance Company Zurich Compagnie D'Assurance Defendants Before: The Honourable Madam Justice Griffin Oral Reasons for Judgment In Chambers Counsel for the Plaintiffs in Action No. S084599 and for the Defendants in Action No. S083856 (the "Bilfinger Berger parties"): M.A. Skene A.J. Davison Counsel for the GVWD, GVRD, GVS&DD, and Corporation of North Vancouver (the "Metro Vancouver parties"): S.J. Berezowskyj Counsel for Hatch Mott Macdonald Ltd. ("HMM"): G.S. Miller Place and Date of Hearing: Vancouver, B.C. Place and Date of Reasons: Vancouver, B.C. July 6, 2010

- [1] The parties have come to this case management conference raising some concerns about the scope and manner of document production.
- [2] I should first note that the parties are to be commended for proceeding in an orderly and co-operative way to produce vast quantities of documents. Early on they agreed to a protocol for document production to allow for electronic production and searching of produced documents.

- [3] Two groups of parties, the Bilfinger Berger parties and the Metro Vancouver parties, brought motions before this case management conference seeking specific orders for document production from the opposing group of parties. It is fair to say that they have reached agreement on most of their document production issues and agreed to adjourn their motions generally subject to some specific directions that are sought.
- [4] Counsel for the Metro Vancouver parties seeks specific directions based on a concern that the Bilfinger Berger parties have not made best efforts to comply with their document production obligations.
- [5] Having heard the submissions, while there are some valid complaints, I am not persuaded that the parties have not acted in good faith to live up to their document production obligations. I am not convinced that strong directions are needed at this point and I accept the assurances of counsel that ongoing efforts are being made to meet document production obligations.
- [6] I will therefore only make general directions in line with the parties' agreements as follows:
1. The Bilfinger Berger parties will make best efforts to produce all documents within the scope of their obligation to produce by July 30, 2010, including listing any documents they consider privileged by providing details of author, recipient and date of document.
 2. The Bilfinger Berger parties will confirm to the other parties by August 31, 2010 that they have produced all documents within their scope of their obligation to produce.
 3. The Metro Vancouver parties -- and I take it that is to include HMM -- will meet the same two stages of document production obligations with respect to at least that category of documents created before January 1, 2010.
 4. By August 31, 2010 the Metro Vancouver parties, including HMM, will propose a plan for ongoing document production with respect to those documents created after January 1, 2010 that have not already been produced.
- [7] I observe -- and this is not necessarily a direction -- but I observe that the parties have gone a considerable way to generate an agreed trial plan as at July 6, 2010. That trial plan lists issues of fact and issues of law presently anticipated at trial. I observe that some of those issues of fact or law may not have been anticipated when parties originally advised their clients of document production obligations or reviewed their documents. I therefore ask each counsel to review that trial plan list of issues carefully with a view to ensuring that the scope of their clients' document production is wide enough to allow opposing parties to investigate or challenge those issues.
- [8] There is a remaining issue. The Bilfinger Berger parties have produced some documents in the German language. The Metro Vancouver parties seek two directions in regards the German documents.

- [9] First, they seek an order or direction that the Bilfinger Berger parties cull from their list clearly irrelevant German documents. In this regard they point to e-mails of a social nature having nothing to do with the construction project at issue. Counsel for the Bilfinger Berger parties has given a reasonable explanation for why these documents made it into their production. Nevertheless, the Metro Vancouver parties ought not to be put to the expense of translating irrelevant documents that ought never to have been produced. The German speakers who are employed by the Bilfinger Berger parties can more readily review and cull the irrelevant document than can the Metro Vancouver parties. I therefore will direct that the Bilfinger Berger parties do this.
- [10] Second, the Metro Vancouver parties seek an order or direction that Bilfinger Berger provide translations of the German language documents that they have produced. This is a more difficult issue.
- [11] In a different case, *Han v. Cho*, 2008 BCSC 1208, I ruled that neither the Rules of Court nor the interests of justice require the producing party to translate documents for the other side.
- [12] Two other cases take the same view: *Kellogg Company v. Imperial Oil Ltd.* (1996), 29 O.R. (3d) 70, a decision of the Ontario Court General Division, and *Jasper Millwork Ltd. v. Borden Co.*, [1996] A.J. No. 1223, a decision of the Alberta Court of Queen's Bench.
- [13] Counsel for the Metro Vancouver parties argues that *Han v. Cho* is distinguishable for two reasons. In that case the applicant was seeking certified translations, and further, both sides were speakers of the foreign language at issue and so could read the documents. Here the Metro Vancouver parties would be content with informal uncertified translations by the Bilfinger Berger parties rather than certified translations, and the Metro Vancouver parties do not speak German.
- [14] Metro Vancouver is suggesting that the original authors of the documents could translate them. Given the wide scope of production in this case I do not see how this could be done efficiently. The authors are working professionals and some of them are no longer working for the Bilfinger Berger parties.
- [15] Further, the problem with requiring the Bilfinger Berger parties to translate the documents is that it can give rise to a whole new area of issues arising out of whether or not the translation was accurate or deliberately misleading. It has the danger of creating a sub-category of collateral issues in the litigation.
- [16] I therefore conclude that having the producing party translate the documents will not be an efficient or effective process.
- [17] In my view, absent agreement between the parties, the Metro Vancouver parties cannot transfer the burden of hiring their own interpreter if they wish to translate to English the documents produced to them. They can hopefully manage that cost by having an interpreter assist them with an informal translation without necessarily having a formal certified translation of each German language document. When, through the use of their interpreter,

the Metro Vancouver parties determine which documents are most relevant to their case, they may wish to confirm their translation of those documents by agreement or through the examination for discovery process.

- [18] Certainly by the time this case gets to trial I would hope that the parties would be able to reach agreement in advance on the translation of any German documents to be tendered as exhibits. This would likely be a much smaller subset of the German documents produced in the pre-trial discovery process.
- [19] I further observe that these parties were in a sophisticated commercial relationship. These types of contracts often anticipate litigation and have agreements as to a court's jurisdiction or arbitration, for example. The Metro Vancouver parties knew that they were entering into a contractual relationship with a party that had many German employees. Metro Vancouver did have the opportunity to request a contractual term that if litigation between them did ensue Bilfinger Berger would be required to translate any of its German documents into English. Presumably solicitors in the future may wish to consider such a term.
- [20] In this case I therefore decline to direct that the Bilfinger Berger parties translate their German language documents into English.

The Honourable Madam Justice S. Griffin

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